

**ARKANSAS COURT OF APPEALS**  
**NOT DESIGNATED FOR PUBLICATION**

DIVISION II  
No. CACR08-58

REX COLE STEWARD

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**Opinion Delivered** September 3, 2008

APPEAL FROM THE SEBASTIAN  
COUNTY CIRCUIT COURT,  
[NO. CR-1999-823-E]

HONORABLE STEPHEN TABOR,  
JUDGE

AFFIRMED

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**DAVID M. GLOVER, Judge**

This is an appeal from the revocation of a suspended imposition of sentence. Appellant, Rex Steward, contends that the State failed to prove that he violated the terms and conditions of his suspended sentence by a preponderance of the evidence. We affirm.

Steward pleaded *nolo contendere* in December 2001 to the offense of conspiracy to manufacture methamphetamine. He was sentenced to prison for seven years, with an additional ten-year suspended imposition of sentence. Steward was paroled from prison in July 2004. One of the conditions of his suspended sentence was that he not violate any federal, state, or municipal law.

The State filed a petition to revoke Steward's suspended sentence in September 2007, alleging that he had committed the new offenses of possession of methamphetamine with intent to deliver, possession of drug paraphernalia, and possession of marijuana, in violation

of the terms of his suspended sentence. A hearing on the petition to revoke was held on October 10, 2007.

At the revocation hearing, Wayne Barnett, a Fort Smith Police Department detective, testified that based on his conversations with a reliable confidential informant, whose past information had led to five felony drug-related arrests, he developed information that Steward was selling large quantities of methamphetamine from Steward's nephew's residence. The informant told Barnett that although the residence belonged to Steward's nephew, Steward was staying there most of the time and was using it as a place to sell drugs because his name was not connected to the residence in any way. The informant also told Barnett that Steward drove a Harley-Davidson motorcycle, which Barnett later observed parked outside the residence; the mobile-phone number that Steward was using to conduct transactions; and that Steward frequented a bar called the Branding Iron, where he sold a lot of his drugs.

Barnett testified that on September 4, 2007, the informant spoke with Steward by phone, and Steward told the informant that he had methamphetamine to sell. Barnett met with the informant, and the informant participated in a recorded phone conversation in which he arranged to meet Steward at the Branding Iron to purchase some methamphetamine. Surveillance was set up on Steward's nephew's residence, where Steward was observed leaving on his motorcycle and traveling toward the Branding Iron. Barnett testified that the officers decided to make contact with Steward when he pulled over at a gas station and got off the motorcycle so that there would not be a possible pursuit. Barnett said that he and the other officers made contact with Steward in the parking lot; that he (Barnett) searched Steward and

found a small velvet bag in Steward's pants pocket; and that the velvet bag contained five individually packaged quantities of a crystalline substance that Barnett recognized as methamphetamine. When this bag was found, Steward stated that it was "nothing but some straight up cut," which Barnett took to mean that it was not methamphetamine, but rather a "cutter" added to methamphetamine to make the quantity larger. Subsequent tests at the crime lab indicated that the substance in the individually packaged bags was not a cutter, but rather 3.1531 grams of methamphetamine. Barnett also testified that he found \$506 in cash in Steward's pocket.

Knowing that Steward was on parole, Barnett contacted Steward's parole officer, Craig Roby, with the information and assisted Roby with the search of Steward's nephew's residence after Steward was taken into custody. Two sets of digital scales, a package of small ziplock bags, and a cellophane wrapper containing what was later determined to be burned marijuana cigarette butts were found during the search of the residence.

Barnett testified that he Mirandized Steward, and that Steward agreed to talk to him. Steward told Barnett that he had started selling methamphetamine a few weeks ago because he needed some extra money. Steward also told Barnett that he used methamphetamine, that he usually injected it, and that he had last used methamphetamine the day before he was arrested. Steward told Barnett that the methamphetamine he had used was part of what Barnett had found on him, but that he did not think it was actually methamphetamine because it had not broken down in the spoon and he had not gotten high from it. Steward told Barnett that he had added epsom salts to the drugs to double the quantity, repackaged

it into five packages, and was going to sell each bag for fifty dollars because he did not think that it was very good quality and because he owed his source \$250 for the drugs. Steward gave Barnett a North 37<sup>th</sup> Street address as a home address, but he also said that he had spent the night maybe twice with his nephew at his residence. Steward also denied to Barnett that the marijuana and the scales found in his nephew's residence belonged to him, and he said that he did not really live at his nephew's house. Steward then told Barnett that he did not want to talk anymore, and Barnett ended the interview.

Craig Roby, Steward's parole officer, testified that Detective Barnett assisted him in a search of a residence in which Steward was believed to be staying. Roby stated that the residence searched was not the residence address that Steward had reported. However, Roby said that Steward had signed consent for Roby to search his house at any time as a parole officer, that the consent allowed a search wherever the parolee was maintaining his residence, and that Steward told Roby just after his arrest that he had been staying at his nephew's residence.

At the close of the hearing, the trial court found that Steward had violated the terms and conditions of his suspended sentence by committing the offense of possession of methamphetamine with intent to deliver, notwithstanding the evidence of the other crimes. The trial court then revoked Steward's suspended sentence and sentenced him to a term of twenty years in the Arkansas Department of Correction.

Steward now brings this appeal, arguing that the evidence was insufficient that he had the intent to deliver methamphetamine, only that he possessed contraband; that the

investigatory stop that led to the discovery of the methamphetamine was flawed and illegal because it was based entirely upon information supplied by a confidential informant, who was not sufficiently shown to be reliable; that the investigatory stop and subsequent seizure violated his Fourth- and Fourteenth-Amendment rights; and that the marijuana and digital scales found pursuant to a search at his nephew's residence were subject to suppression because there was no indication that the residence belonged to him or that the evidence found there was connected to him.

A trial court may revoke a defendant's suspended sentence at any time prior to the expiration of the period of suspension if it finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his suspended sentence. Ark. Code Ann. § 5-4-309(d) (Repl. 2006). In a hearing to revoke, the burden is on the State to prove a violation of a condition of the suspended sentence by a preponderance of the evidence. *Stultz v. State*, 92 Ark. App. 204, 212 S.W.3d 42 (2005). On appellate review, the trial court's findings are upheld unless they are clearly against the preponderance of the evidence. *Id.* The appellate courts defer to the trial court's superior position to determine credibility and the weight to be accorded testimony. *Id.* In order to revoke a suspended sentence, the State need only prove one violation. *Id.* When appealing the revocation of a suspended sentence, it is the appellant's burden to prove that the trial court's findings were clearly against the preponderance of the evidence. *Rudd v. State*, 76 Ark. App. 121, 61 S.W.3d 885 (2001).

Steward first argues that the evidence is insufficient to establish that he actually had

intent to deliver methamphetamine, that it only shows that he possessed contraband. He is incorrect. It is a Class Y felony to possess with intent to deliver less than twenty-eight grams of methamphetamine. Ark. Code Ann. § 5-64-401(a)(1) (Supp. 2007). Possession of two hundred milligrams of methamphetamine creates a rebuttable presumption of intent to deliver. Ark. Code Ann. § 5-64-401(d)(3)(ix). In this case, the crime-lab report revealed that there were 3.1531 grams of methamphetamine/dimethyl sulfone found on Steward's person. Furthermore, Wayne Barnett testified that Steward told him that he had repackaged the methamphetamine into five separate packages and planned on selling each package for fifty dollars each. This evidence is sufficient to support the trial court's decision to revoke Steward's suspended sentence. Because the State must only prove one violation to revoke a suspended sentence, we find it unnecessary to address Steward's arguments that the marijuana and digital scales found pursuant to the parole search at his nephew's residence were subject to suppression and should not have been used against him in the revocation proceeding.

Steward also argues that the methamphetamine was subject to suppression because the investigatory stop that led to its discovery was flawed and illegal due to the fact that the stop was based entirely upon information supplied by a confidential informant who was not sufficiently proven to be reliable. This argument was never made to the trial court; therefore, it is not preserved for our review.

Steward finally argues that the investigatory stop and subsequent seizure violated his Fourth- and Fourteenth-Amendment rights. The exclusionary rule does not apply in revocation hearings unless the defendant can prove a lack of good faith by law enforcement

officers, *Cook v. State*, 59 Ark. App. 24, 952 S.W.2d 677 (1997). Furthermore, in this case the issue is not preserved for appellate review. Steward did not file a motion to suppress the methamphetamine, nor did he object at the time of the testimony regarding it. Even in a revocation proceeding, a defendant must raise issues in a timely fashion or they are waived. *See Swanigan v. State*, 336 Ark. 285, 984 S.W.2d 799 (1999).

Affirmed.

BIRD and MARSHALL, JJ., agree.